IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 773

NATIONAL HELLS CANYON ASSOCIATION, INC., ET AL.,
Petitioners

v.

FEDERAL POWER COMMISSION AND IDAHO POWER COMPANY, *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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PETITION FOR REHEARING OF THE ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners pray that this Court grant rehearing of its order of April 1, 1957, denying the petition for writ of certiorari, 353 U.S. 924, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit in the above-entitled case as prayed for in the petition filed February 14, 1957, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

Since the filing of the petition for writ of certiorari herein, a series of events has occurred which throws new light on the weakness of the decision below as it affects the licensing standard of § 10(a) of the Federal Power Act, the vitality of the national conservation policy for water resource development and its orderly administration.

1. On March 28, 1957, the Senate reaffirmed the mandate of Congress, embodied in § 10(a) of the Federal Power Act and other federal statutes,[1] that comprehensive plans for multipurpose development of the Nation's waterways must adhere to maximum feasible basin-wide goals (S. 497, 85th Cong., 1st Sess., Sec. 203; 103 *Cong. Rec.* (unbound) 4111 *et seq.*). The bill now awaits House action. Referring specifically to the comprehensive plan for developing the Columbia River and its tributaries, prepared by the Corps of Engineers and first reported to Congress in 1950, this new directive instructs the Corps as follows (S. 497, 85th Cong., 1st Sess., p. 44):

> "In carrying out the review of House Document Numbered 531, Eighty-first Congress, second session, and other reports on the Columbia River and its tributaries, pursuant to the resolution of the Committee on Public Works of the United States Senate dated July 28, 1955, the Chief of Engineers shall be guided by flood control goals not less than those contained in said House Document Numbered 531."

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[1] E.G., 44 Stat. 1010, 1015; and see Report of President's Water Resources Policy Commission, 1950, Vol. III, chap. 9.

The flood control goals of the 1950 plan included, for the current phase of development, 27 million acre-feet of usable storage, of which 21 million would be required barely to cope with a particular historical flood pattern. Facilities that could provide such storage would be useful, of course, not only for flood control, but for power development, recreation, navigation and other beneficial public uses contemplated in the plan.

The Court below rejected the contention that Congress intended the goals of the 1950 coordinated comprehensive plan to serve *prima facie* as the standard of proper development for the Columbia Basin. The Court approved a license that would sacrifice 2.88 million acre-feet (or three-fourths) of the potential storage at Hells Canyon, all of which is needed to achieve the flood control and other plan goals. The new directive passed by the Senate reinforces the contention which the Court below rejected. By the same token, it reinforces the petition for writ of certiorari.

2. The failure of the decision below clearly and simply to rule on the meaning of a "comprehensive plan" has resulted recently in such confusion among the three Government agencies chiefly concerned with water resource development as to threaten administrative chaos. Orderly administration in this important field, affecting vital regional and national interests, warrants more clearly than heretofore a review and clarification of the decision below.

(a) On February 14, 1957, the Secretary of the Interior released a letter to the Chairman of the Federal Power Commission, advising that he had ordered the Bureau of Reclamation to make further studies

of a storage project at Pleasant Valley (downstream from Hells Canyon in the Middle Snake) that would inundate one or possibly two of the damsites licensed to Idaho Power Company. The Secretary estimates that $73,500 is to be spent on these studies in the fiscal year 1957 and another $132,500 in 1958.

Petitioners contended that one of the three Idaho Power dams might never be built and that the remaining two dams could not begin in any way to measure up to the statutory standard. The disposition of this fundamental contention by the Court below is so unclear that the Secretary of the Interior now proposes to spend $206,000 of federal funds in studying a storage project that would preclude one or even two of the three Idaho Power dams.[2]

(b) Following the Secretary's announcement of the new study by the Bureau of Reclamation, the Corps of Engineers has likewise undertaken to re-study the Middle Snake. Its program includes further investigation of a multi-purpose storage project at Nez Perce, downstream from Hells Canyon, that would inundate the project at Pleasant Valley now under study by the Bureau of Reclamation. The Corps is budgeting more than $400,000 for its over-all basin study in the fiscal years 1957 and 1958.[3]

The Nez Perce project was proposed in the 1950 coordinated comprehensive plan as part of the next phase of development following the phase in which the high Hells Canyon project would be constructed.

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[2] "Hells Canyon Project, Idaho-Oregon", hearings before the Subcommittee on Irrigation and Reclamation of the Committee on Intererior and Insular Affairs, U.S. Senate, 85th Congress, 1st Session on S. 555, March, 1957, pp. 85-86, 140-141, 143, 154-158.

[3] *Ibid.*, pp. 250-251.

The irreconcilability of the new Corps study and the new Bureau study is further evidence of the current confusion. By casting doubt on the long-established concept of comprehensive development, the Court below has opened an administrative Pandora's box.

(c) In a recent license proceeding affecting the Middle Snake, the Staff of the Federal Power Commission recommended on March 15, 1957 that the Commission deny a license application for a project below Hells Canyon that would preclude construction of the Nez Perce project.

This Staff recommendation was based on a recognition of the need for additional storage in the Middle Snake. The irreconcilability of this position with the Staff position and the Commission decision in the Hells Canyon case, which ignored the need for such storage, further demonstrates that the Court below has left even the agency administering the Federal Power Act without adequate—albeit necessary—guidance.[4]

In summary, this test case, which should have produced some judicial direction for orderly administration in an important area of public law, has produced only confusion bordering on chaos.

3. In *Chapman* v. *Federal Power Commission,* 345 U.S. 153, 155 (sometimes called the *Roanoke Rapids* case), this Court granted review on the ground that the case involved "a conflict of view between two agencies of the Government having duties in relation to the development of national water resources"; the Court further noted that a determination of the issues "may affect a substantial number of important potential sites for the development of hydro-electric power".

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[4] Pet. App. 28-29.

In that case the conflict of view was between the Federal Power Commission and the Interior Department, principally on the narrow question whether a particular project proposed in a comprehensive plan of the Corps of Engineers should be federally or privately developed. Here the differences in view that have appeared since the filing of the petition for writ of certiorari involve all three of the principal agencies concerned with water resource development; and they involve questions far broader and deeper than those in the *Roanoke Rapids* case—questions probing the very concept of comprehensive development. The determination of these questions will affect, even more assuredly and pervasively than in the *Roanoke Rapids* case, "a substantial number of important potential sites for the development of hydro-electric power".

4. The foregoing problems relate exclusively to the interpretation and application of the licensing standard contained in § 10(a) of the Federal Power Act. Accordingly, this petition presents issues which can be determined without reference to the problems of federal-versus-non-federal development that have arisen under § 7(b) of the Act. Petitioners respectfully suggest that, if the Court were to limit its review here to the issues under § 10(a)—the novelty and importance of which are undisputed—the Court could make a most significant and salutary contribution to the law of water resource development. Without a definitive and, above all, a clear and intelligible construction of the statutory licensing standard as applied to the facts of this test case, the law in this field will remain obscure, and its administration thereby virtually sealed against effective judicial review.

If the Commission license to under-develop the resources at Hells Canyon, one of the country's greatest

natural multi-purpose damsites, can be sustained without more searching inquiry and analysis than that provided by the Court below, the Commission can justify any degree of under-development anywhere. Perhaps never before has an administrative agency been left with such unregulated power to defeat the very purposes for which it was created.[5]

It took 20 years of struggle and compromise to establish the national policy of maximum feasible multi-purpose development of the country's river systems, reflected in the Federal Power Act and specifically § 10(a). Without a clarifying opinion by this Court, Congress will be left not merely with the question whether federal development at Hells Canyon is necessary to implement this national policy, but with the much larger question, whether the policy itself must be reformulated to assure its effectuation. If the Act has failed in its purpose, and if it should take another period of years to reestablish the policy, there may be few if any multi-purpose damsites left to protect against the relentless drive of single-purpose power interests.

It is difficult to conceive of a case that could present any greater need for the exercise of this Court's supervisory judicial function.

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[5] See § 10 of Administrative Procedure Act, 60 Stat. 243; cf. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

EVELYN N. COOPER
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Counsel for Petitioners
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Washington 6, D. C.

April 26, 1957

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

EVELYN N. COOPER

MOTION FILED MAY 9 1957

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MOTION FOR LEAVE TO FILE SUPPLEMENT
and
SUPPLEMENT TO PETITION FOR REHEARING OF THE ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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May 9, 1957

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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MOTION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR REHEARING OF THE ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners move this Court for leave to file the accompanying Supplement to Petition for Rehearing of the Order Denying Petition for Writ of Certiorari in this cause.

In support of this motion, petitioners cite the fact that the Office of Defense Mobilization has recently issued necessity certificates for accelerated amortization for two of the three Idaho [illegible]ver Company proj-

ects approved by the decisions below. This action, described in the Supplement as constituting a separate and distinct basis for this Court's review and action, was not recorded in any official journal and did not become known to the petitioners until reports of it appeared in the Washington press on the morning of April 26, 1957—the last day for filing the Petition for Rehearing under this Court's Rule 58-1. Petitioners submit that the cost to the Federal government resulting from this action of the Office of Defense Mobilization constitutes an intervening circumstance of substantial effect in view of the stated opinion of the Federal Power Commission, affirmed by the Court below, that the 3-dam project licensed by the Commission order would be constructed at no cost to the United States. Petitioners further submit that this intervening circumstance has not heretofore been put before the Court in this cause.

Petitioners motion for leave to file the Supplement seeks to place before this Court a significant intervening event which invalidates a major premise of the decision below, and emphasizes the need for this Court's review and remedial action.

Respectfully submitted,

EVELYN N. COOPER
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May 9, 1957

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SUPPLEMENT TO PETITION FOR REHEARING OF THE ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners renew their prayer contained in the petition for rehearing filed April 26, 1957, and hereby separately pray that in light of the intervening circumstance described below the Court grant relief appropriate thereto by issuing a writ of certiorari and, without further proceedings in this Court, reversing the judgment of the Court below, with instructions that it remand the cause to the Federal Power Commission for further proceedings to consider the new circumstance.

ADDITIONAL REASON FOR GRANTING REHEARING AND ISSUING THE WRIT

On April 26, 1957, the day petitioners filed their petition for rehearing herein, it was reported in the Washington press that the Office of Defense Mobilization had issued certificates of necessity for accelerated tax amortization for two of the three Idaho Power Company projects licensed by the Commission decision below.[1] Pertinent excerpts from the official press release of the Office of Defense Mobilization are appended hereto.

This new development constitutes a separate and distinct basis for review and action by this Court. It invalidates one of the chief grounds on which the Commission based its judgment and decision, under § 7(b) of the Federal Power Act, that the water resources of Hells Canyon should not be developed by the United States. The Commission decision, affirmed by the Court below, relied heavily on the proposition that the public purposes to be served by the Idaho Power projects, although less than those attainable from the federal high dam project, "will be realized without expense to the United States"—that benefits from the Idaho Power development would be provided "at no cost to the United States" (Pet. App. 36).[2]

It now appears that the licensed projects will entail substantial cost to the United States and its taxpayers.

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[1] Washington Post and Times Herald, April 26, 1957, p. A-2.

[2] The Commission was aware that applications for accelerated tax amortization were pending with ODM, but apparently assumed that they would not be granted. ODM was on notice of the FPC decision and the reasons for it, but nevertheless admittedly withheld action on the applications until after the Supreme Court order of April 1, 1957 denying the petition for certiorari (see Appendix, *infra*).

The cost to taxpayers attributable to the accelerated tax amortization will amount, as shown below, to not less than about $29 million, or not less than 28 per cent of the Company's estimated cost of the two certificated projects. The cost to taxpayers could be on the order of $97 million or about 94 per cent of the Company's total estimated cost of the two certificated projects.

This intervening circumstance is of substantial effect. It destroys one of the principal grounds of the Commission decision. What effect the new circumstance would have upon the Commission's judgment under § 7(b) cannot be ascertained without further Commission proceedings and consideration, since the judgment required by § 7(b) is expressly reserved to the Commission. *Connecticut Light & Power Company* v. *Federal Power Commission,* 324 U.S. 515 (1945); *Chenery Corporation* v. *Securities and Exchange Commission,* 318 U.S. 80 (1943); *Pottsville Broadcasting Company* v. *Federal Communications Commission,* 98 F. 2d 288 (1938).

The certificates for accelerated amortization apply to 65 per cent of the cost of Brownlee dam and 60 per cent of the cost of Oxbow dam. On the basis of the Company's cost estimates of $67,138,240 and $35,932,130, respectively (deemed low by the Federal Power Commission), these percentages would amount to $43,639,856 and $21,559,278, respectively, or a total of $65,199,134. The Office of Defense Mobilization certificates would enable Idaho Power Company to depreciate this sum at the rate of 20 per cent per year for five years, rather than at the normal rate, and to deduct corresponding amounts from its taxable income.

Over the five-year period, the special deductions thus allowed would amount to approximately $58,679,221.[3]

Based on the Company's normal tax rate of 52 per cent, the special deductions will reduce the Company's taxes over the five-year period by a total of about $30,513,195. According to the Federal Power Commission, such tax savings are equivalent to an "interest-free loan" by the United States Government to the certificate holder.[4]

After the fifth year, and over the succeeding 45 years, when the total investment will presumably be depreciated, the Government will receive back in small annual instalments, and without interest, the $30,513,195.[5] But, meanwhile, if the Treasury is to be restored to a condition approximating that which would have prevailed in the absence of the fast tax write-off, the Government will have to make up this amount (less the gradual repayments) by increasing taxes of others or by borrowing.[6] The cost to the tax-

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[3] I.e., the difference between the accelerated depreciation ($65,199,134) and normal depreciation ($6,519,913), assuming the latter at the rate of 2% per year. The license period is 50 years.

[4] Federal Power Commission Opinion No. 264, *In the matter of Treatment of Federal Income Taxes as Affected by Accelerated Amortization*, Docket No. R-126, issued December 4, 1953, p. 3.

[5] Assuming tax rates remain unchanged over the 45-year period. The repayments would be in the form of slightly increased annual tax payments; the residual depreciation charges will be less than normal, and taxable income will be increased accordingly.

[6] See "A Report on 5-year Amortization of Emergency Defense Facilities under Section 168 of the Internal Revenue Code of 1954", Committee Print, Joint Committee on Internal Revenue Taxation, December 1956, pp. 12-13; also statement by Secretary of the Treasury, George M. Humphrey, before Senate Finance Committee on S. 1795, May 7, 1957; see Washington Post and Times Herald, May 8, 1957, p. A-2.

payers of the interest-free loan will accordingly amount to not less than the Government's cost of borrowing the money.

Assuming a cost of 2 per cent compounded annually on the unpaid balance, (recent interest rates on long-term Government debt are over 3 per cent), petitioners estimate that over the 50-year period of the license, and giving effect to gradual repayments by the Company as aforesaid, the cumulative cost to the United States Treasury would be of the order of about $29 million. At a compound interest rate of 3 per cent, the cumulative cost to the United States Treasury would be of the order of $97 million.

The foregoing calculations are offered not as precise measures, but as an indication of the possible magnitude of the cost of the two certificated Idaho Power projects to the United States Treasury, the lower of the two figures being very conservative.

The petition for rehearing, filed April 26, 1957, urged grounds relating exclusively to § 10(a) of the Federal Power Act. It contemplated the possibility of a review limited to the issues under that section, without reference to the issues under § 7(b) of the Act. The additional ground for review set forth in this supplement, however, inescapably concerns the Commission decision under § 7(b).

It now appears that two of the three Idaho Power projects will entail a cost to the United States of at least $29 million and possibly as much as $97 million. This new fact is so plainly inconsistent with one of the major premises of the Commission judgment and decision, affirmed by the Court below, as to constitute a separate additional ground for rehearing and review.

CONCLUSION

For the reasons set forth above and in the petition for rehearing, filed April 26, 1957, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the District of Columbia Circuit.

As to the ground set forth in this supplement, petitioners submit that upon granting review, and without further proceedings in this Court, the judgment below should be reversed, with instructions to the Court of Appeals to remand the case to the Federal Power Commission for further administrative proceedings and consideration in light of the substantial intervening development.

Respectfully submitted,

EVELYN N. COOPER
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Washington 6, D. C.

May 9, 1957

Certificate of Counsel

I hereby certify that the foregoing Supplement to Petition for Rehearing of the Order Denying Petition for Writ of Certiorari is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

EVELYN N. COOPER

APPENDIX

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF DEFENSE MOBILIZATION
WASHINGTON 25, D. C.

Advance Release for AM's
Monday, April 29, 1957

No. 581
Certificates of Necessity

Certificates of necessity for accelerated tax amortization for 27 new or expanded facilities amounting to $197,363,693 were issued by the Office of Defense Mobilization in the two-week period from April 4, 1957, through April 17, 1957, it was announced today.

ODM emphasized that the accelerated tax amortization certified by the agency represents investment of private capital and does not involve the investment of Government funds.

Among the certificates issued were two for Idaho Power Company. In August 1953, the Company filed two applications for necessity certificates which would provide for accelerated tax amortization, on two proposed power developments on the Snake River at Brownlee and Oxbow, Oregon-Idaho. Cost of the Brownlee project was estimated by the company at $67,138,240 and of the Oxbow project at $35,943,730.

On August 4, 1955 the Federal Power Commission granted licenses covering the two projects.

In accordance with then applicable procedures and criteria, established by the ODM, the Department of the Interior on October 25, 1955 recommended that necessity certificates be issued on both projects.

The construction of the projects was started in 1955 and in accordance with established procedure their power capability was charged against the electric power expansion goal which was open at that time. However, issuance of the certificates was withheld pending settlement of litigation, which involved the FPC's approval of the projects. This litigation was terminated by action of the Supreme Court on April 1, 1957.

Necessity certificates for both projects were issued by the ODM on April 17, 1957. Brownlee was certified for 65 percent of its cost; Oxbow for 60 percent.

ODM reported that of the 27 certificates issued, 5 are for facilities involving small business. The estimated cost of the facilities is $719,133. ODM gives special consideration to those projects to encourage small defense plant expansion.

With the certificates announced today, accelerated tax amortization amounting to $37,834,398,000 has now been granted for 21,867 new or expanded facilities. ODM explained that the dollar value given refers to the face value of the certificates. Of this amount, which is the estimated cost of the facility stripped of such extraneous items as the cost of the land, only a certain percentage may be depreciated at the rapid rate. Thus of the amount certified for accelerated amortization so far, 60 per cent or $22,855,890,000 is eligible for rapid depreciation.

The main purpose of the amortization program is to expand private industry's productive capacity to meet mobilization goals. Unlike the situation during World War II, Government ownership of defense facilities during this emergency period is being held to a minimum.

The accelerated tax amortization program is provided for in Section 168 of the 1954 Internal Revenue Code. This section permits a tax write-off of a portion of a capital investment in defense facilities over a five-year period. The normal period for such write-offs would be 20 years or longer. The portion of the investment subject to tax write-off is determined by ODM and depends among other factors, on the type of facility, the amount of expansion required for the emergency, the probable usefulness of the plant for other than defense purposes after the emergency, and the degree of financial aid necessary as an incentive to encourage the expansion.

The list of certificates follows:

CERTIFICATES OF NECESSITY NO. 581

Name of company and location of facilities	Product or service	Amount certified	Percentage allowed
* * *	* *	*	*
Idaho Power Company[2] Baker County, Oregon & Adams County, Idaho	Electric power generating facilities	$35,932,130	60
Idaho Power Company[2] Baker County, Oregon & Washington County, Idaho	Electric power generating facilities	67,138,240	65

[2] Transactions dated April 17, 1957.

FILE
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JOHN T. FEY,

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NATIONAL HELLS CANYON ASSOCIATION, INC.,
LEWIS COUNTY PUBLIC UTILITY DISTRICT,
PUBLIC UTILITY DISTRICT NO. 1 OF KLICKITAT COUNTY,
BENTON COUNTY PUBLIC UTILITY DISTRICT,
CLARK COUNTY PUBLIC UTILITY DISTRICT,
PUBLIC UTILITY DISTRICT NO. 1 OF SKAMANIA COUNTY,
PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC COUNTY,
PUBLIC UTILITY DISTRICT NO. 3 OF MASON COUNTY,
FRANKLIN COUNTY PUBLIC UTILITY DISTRICT NO. 1, and
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION,
Petitioners

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FEDERAL POWER COMMISSION, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF THE STATE OF OREGON AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR ISSUANCE OF THE WRIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF OF THE STATE OF OREGON AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR ISSUANCE OF THE WRIT

INTEREST OF THE STATE OF OREGON

The interest of the State of Oregon in the questions presented in this case is dual, economic on the one hand and governmental on the other.

Economic Interest

The greatest single existing and potential asset to the economy of the State of Oregon is the hydroelectric energy, reclamation and navigation potential of the Columbia River and its tributaries. Full-scale integrated development of the resource potential of the river system is the keystone to the future economic well-being of the inhabitants of this state.

Prior to large scale developments on the river and its tributaries, the economy of the state was, and to a considerable extent remains, lumber and agriculture based. Both such activities are highly seasonal in nature and productive employment therein fluctuates greatly throughout the year.

The availability of low-cost hydroelectric energy and abundant, pure water are the primary attractions offered by the state to industry. Commercial and industrial growth in the state in recent decades, particularly investment in metals and chemicals projects has tended very closely to parallel utilization of low-cost hydroelectric energy. Greater diversification of commercial activity made possible thereby has tended markedly to stimulate the economy of the state as a whole and has had the additional and highly beneficial effect of leveling out peaks and valleys in employment.

Even though it forms the backbone of commercial and industrial growth in the area, the Columbia in its natural state is at the same time one of the greatest threats to the economy of the region by reason of violent annual flooding. The ratio of peak runoff to average minimum flow is approximately ten to one. On a river the size of the Columbia, such a ratio is unusual and creates critical flood dangers. The tragedy of the

1948 Vanport flood is a solemn reminder of the power of the river to destroy the things that its otherwise beneficial qualities make possible. During 1956 the region narrowly escaped an equally extensive and potentially far more damaging flood.

The full potential of the river system is as yet less than one third realized, notwithstanding the extent of the existing investment. Maximum development of remaining sites and the integration of such development with existing facilities is of crucial importance to the state and to its people. The channeling of these economic problems within the confines of litigation concerning a particular project must not be permitted to minimize the relationship that each proposed project has to comprehensive development. Integration of each such project into the existing system for the coordinate purposes of reclamation, navigation and especially for flood control storage and power generation is an underlying factor that must not escape the court's attention.

The future economic health of the State of Oregon may hinge in large part upon the decision in this case. The concern of the state and of its people in such matters is so immediate and important that the court would be fully justified in taking judicial notice thereof. *U. S.* v. *Rumley,* 345 U.S. 41, 73 S. Ct. 543 (1953); *U. S.* v. *Reynolds,* 345 U.S. 81, 73 S. Ct. 528 (1953). This would be true even if the state were appearing in an adversary capacity. *State of Georgia* v. *Pennsylvania R. Co.,* 324 U.S. 439, 65 S. Ct. 716 (1945); *State of Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230, 27 S. Ct. 618; *Missouri* v. *Illinois,* 180 U.S. 208, 21 S. Ct. 331; *New York* v. *New Jersey,* 256 U.S. 296, 41

S. Ct. 492; *Kansas* v. *Colorado,* 206 U.S. 46, 27 S. Ct. 655; *Colorado* v. *Kansas,* 320 U.S. 383, 64 S. Ct. 176.

Governmental Interest

The Legislature of the State of Oregon through the years has enacted various statutes relating to the development of water resources, regulation of public utility rates and services, preservation of fish and game resources, licensing of hydroelectric projects, stimulation of hydroelectric energy development, and various other matters of general public concern.

These functions are, as they of necessity must be, carried on against the framework of federal activity in the same fields. The primacy of federal jurisdiction relegates state development and administration in such matters to a status ancillary to and, wherever possible, coordinated with, federal action.

The Federal Power Commission for a variety of reasons, mostly fiscal, has itself been unable actively to engage in full-scale comprehensive study and planning in connection with reclamation, irrigation, hydroelectric generation and flood control aspects of regional development. *City of Tacoma,* 10 FPC 424, 92 PUR NS 79 (1951). The Department of the Army, Corps of Engineers, and the Department of the Interior, Bureau of Reclamation, have long been actively engaged in large-scale regional studies and, from time to time, acting under specific authorizations from Congress, have published comprehensive plans for development and utilization of resources, flood control and related matters. As a result, both implicitly by these congressional authorizations and actually by long-standing custom, the responsibility for the preparation of such comprehensive plans has been exercised by these two agencies. The past practice of the Com-

mission has been to rely upon, and on occasion to specifically adopt, plans developed by its sister agencies.[1] The present case strongly suggests a departure from this long-standing practice.

In order to develop an effective program of state action in these areas, it is essential that the legislature of the state concerned have reasonably certain knowledge as to which federal agency is responsible for planning, and the extent to which other federal agencies may deviate from comprehensive plans once developed. Whenever a state, relying upon the existence of an approved comprehensive plan developed by either the Corps of Engineers or the Bureau of Reclamation, has expended money and constructed projects designed to coordinate with existing or proposed federal projects, the possibility that a separate agency of the federal government might have under its statutes latitude in the implementation of the plan sufficient to negate or render valueless all or a part of the state's existing or proposed program can cause economic stagnation. The same thing is true, of course, of the programs of state administrative bodies which have been given responsibility for such matters by existing legislation.

In this case the most important single provision of the Federal Power Act with respect to these matters is in serious dispute. Until this court speaks authoritatively on the question, the present hamstringing uncertainty will continue to exist. The case presents itself in a fashion proper for authoritative interpretation and we feel that the situation clearly justifies such

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[1] *Southern Calif. Edison Co.*, 8 F.P.C., 364, 82 P.U.R. N.S. 299 (1949); *California-Oregon Power Company Project No. 2082*, 3 P.U.R. 3d 207 (1953); *Portland General Electric Co.*, 10 F.P.C. 445, 92 P.U.R. N.S. 247 (1951).

action. *U. S.* v. *Brennan,* 134 F. Supp. 42 (1955); *State of Georgia* v. *Pennsylvania Ry. Co.,* supra; *State of Georgia* v. *Tennessee Copper Co.,* supra; *Missouri* v. *Illinois,* supra; *New York* v. *New Jersey,* supra; *Kansas* v. *Colorado,* supra; *Colorado* v. *Kansas,* supra.

SUMMARY OF ARGUMENT

1. By reason of the primacy of federal regulation the State of Oregon in the execution of its laws is influenced and concerned on a continuing basis by the action of federal regulatory agencies, particularly the Federal Power Commission. The state has a legitimate and pressing need to have disputed questions involving the scope and nature of the powers of the Federal Power Commission resolved so that the state may with reasonable certainty proceed in its own legislative and administrative activities.

2. The case involves questions of far-reaching public significance arising under the Federal Power Act (41 Stat. 1077 as amended; 16 U.S.C.A., Section 791 *et seq.*). The administration of this act is of peculiar and sensitive importance to the State of Oregon and to its inhabitants by reason of the importance of the Columbia River and its tributaries to the economy of the Pacific Northwest and of the State of Oregon.

3. The case involves interpretation and application of portions of the Federal Power Act upon which this court has not heretofore authoritatively spoken and related questions as to which this court has heretofore reserved judgment.

ARGUMENT

Public Significance of the Problem

The Constitution reserves to the Federal Government paramount responsibility for comprehensive development of the Columbia Basin. Without authorization from the Congress, Oregon (and the other states of the region) cannot successfully assert effective control over reclamation, navigation and hydroelectric development on the Columbia and its tributaries. *First Iowa Hydroelectric Cooperative* v. *Federal Power Commission,* 328 U.S. 152, 66 S. Ct. 906 (1946); *Federal Power Commission* v. *State of Oregon,* 349 U.S. 435, 75 S. Ct. 832 (1955).

The Congress by the Federal Power Act[2] has delegated to the Federal Power Commission its authority to license non-federal projects. But in so doing it has by § 10(a) strictly confined the powers of the Commission so as to protect the interests of the states and their people in sound, comprehensive, long-range development of their critical natural resources. This mandate for full utilization of those resources is at once an expression by Congress of its understanding of the dependence of our people on such optimum development and a clearcut recognition of the responsibility which is the concomitant of its constitutionally delegated powers. To construe § 10(a) as anything but an expression of congressional sensitivity to the profound economic consequences to the regions involved of comprehensive river development is to ignore the entire legislative history and background of the Federal Power Act.

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[2] 16 U.S.C. § 803(a) *et seq.*

This case has aspects which cut far deeper than does a case involving review of an ordinary administrative order. The licensing power exercised by the Federal Power Commission under Part I of the Act is wholly dissimilar in nature to its rate regulating powers under Part II of the Act and to the powers of the Interstate Commerce Commission and other federal agencies to issue certificates of necessity and to regulate rates. An application for a motor carrier certificate of public convenience and necessity before the Interstate Commerce Commission, denied today, may tomorrow be granted upon a showing of changed circumstances. New carriers may be authorized to enter service upon development of additional traffic. This may be accomplished in a matter of weeks, or at most, months. An order of the Interstate Commerce Commission or of the Federal Power Commission fixing utility or carrier rates and charges may be modified from time to time to accommodate changing circumstances or to adjust for errors in the original order.

It is not so with a Federal Power Commission license granted for utilization of a river damsite. Once the license has been exercised, circumstances will not permit the correction of error or accommodation for changes, except in the most limited fashion. The licensee, the people of the region, utility consumers and the economy of the States involved must adjust to the project, whether it turns out to be suited to comprehensive regional development or not.

With only partial development of the potential of major storage sites, the maximum utilization of existing project facilities, the engineering features of many of which have been designed to coordinate with

full stream regulation potentialities of subsequently developed sites, may never be realized. Modification and down-grading of other potential sites may be necessitated, threatening additional under-utilization of overall basin potential. Any compromise with full-scale development at a primary project site will have compounding flood-control, navigation and hydro-electric generation impact upon the remainder of the system, existing and potential. The opportunity to make certain that the Federal Power Commission has given proper attention to such matters in a particular case exists only once. This is such an occasion.

If, as has been most strenuously urged, the order of the Federal Power Commission in this case is violative of the basic principle of comprehensive development so explicitly enunciated by the Congress in Section 10(a) of the act, it cannot hereafter be corrected without enormous financial sacrifice and economic waste,—perhaps not at all. Section 10(a) forms the very heart of the Act insofar as the proper stewardship of the economic interests of the people of the State of Oregon are concerned. Clearly the public importance of seriously disputed questions arising thereunder is such as to justify the court in granting certiorari so that an authoritative interpretation may be made. *Federal Communications Commission* v. *R.C.A. Communications,* 346 U.S. 86, 73 S. Ct. 998 (1953); *Reed* v. *Pa. Ry. Co.,* 351 U.S. 502, 76 S. Ct. 958 (1956); *DeSylva* v. *Ballantine,* 351 U.S. 570, 76 S. Ct. 974 (1956).

The Question Has Not Heretofore Been Authoritatively Determined

The present case rests squarely upon an interpretation of Section 10(a) of the Federal Power Act. This provision has never heretofore been authoritatively interpreted by this court.

First Iowa Hydroelectric Coop. v. *Federal Power Commission,* 328 U.S. 152, 66 S. Ct. 906 (1946), is not in point.

Federal Power Commission v. *Idaho Power Company,* 344 U.S. 17, 73 S. Ct. 85, concerns itself with the inter-relationship of Parts I and II of the Act and is not in point.

Federal Power Commission v. *State of Oregon,* 349 U.S. 435, 75 S. Ct. 832 (1955), is not in point.

Federal Power Commission v. *Sierra-Pacific Power Co.,* 350 U.S. 348, 76 S. Ct. 368 (1956), is not in point.

U. S. ex rel. Chapman v. *Federal Power Commission, et al,* 345 U.S. 153, 73 S. Ct. 609 (1953), is not in point. The case involved a situation in which no dispute existed as to the adaptability of the proposed project to comprehensive regional development under Section 10(a). The court did, however, note the importance of 10(a) when indicating that the case then at hand did not necessitate consideration of the 10(a) provision.

CONCLUSION

We have shown that the State of Oregon and its inhabitants have a significant present and long-range interest in a correct resolution of the presented problems, that certainty in such matters is of great public

concern, that this court has heretofore noted the importance of the questions and has not authoritatively spoken thereon. For these reasons and the reasons set out in greater detail above, we most respectfully urge the court to issue the prayed for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Very respectfully submitted,

ROBERT Y. THORNTON
Attorney General of Oregon
Salem, Oregon

Dated February 14, 1957.

Office - Supreme Court, U.
FILED
FEB 14 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 773

NATIONAL HELLS CANYON ASSOCIATION, INC.,
LEWIS COUNTY PUBLIC UTILITY DISTRICT,
PUBLIC UTILITY DISTRICT NO. 1 OF KLICKITAT COUNTY,
BENTON COUNTY PUBLIC UTILITY DISTRICT,
CLARK COUNTY PUBLIC UTILITY DISTRICT,
PUBLIC UTILITY DISTRICT NO. 1 OF SKAMANIA COUNTY,
PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC COUNTY,
PUBLIC UTILITY DISTRICT NO. 3 OF MASON COUNTY,
FRANKLIN COUNTY PUBLIC UTILITY DISTRICT NO. 1, and
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION,
Petitioners

v.

FEDERAL POWER COMMISSION, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF PETITION

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Petitioners,

v.

FEDERAL POWER COMMISSION, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF PETITION

I. INTRODUCTION

The Attorney General for the State of Washington, upon request of the Honorable Albert D. Rosellini, Governor of the State of Washington, does hereby appear in these proceedings to file a brief as *amicus curiae* on behalf of the State of Washington in support of the petition of the National Hells Canyon Association, Inc., and others, for a writ of certiorari.

The previous administration of the State of Washington intervened and participated in the hearings below before the Federal Power Commission in support of the license applications of Idaho Power Company and in opposition to the high Federal Hells Canyon dam.

Accordingly, the position of said previous administration and the testimony presented in the Commission proceeding on behalf of the Honorable Arthur B. Langlie, former Governor of the State of Washington, are hereby repudiated as being contrary to the best interests of the State of Washington.

II. INTEREST OF THE STATE OF WASHINGTON

The immediate and long-range interests of the State of Washington involved in the decision of the Federal Power Commission and affirmed by the United States Court of Appeals are as follows:

a. Flood control planning is a vital component of any "comprehensive plan" for the development of natural resources in the northwestern United States. It is urged to this Court that the Federal Power Commission erred in giving insufficient weight to the factor of flood control planning in granting a license to the Idaho Power Company in the case at bar and that this error was repeated and affirmed by the Court below.

b. The economic future of the State of Washington, as well as that of other states in the Pacific Northwest, is dependent upon the fullest possible development of the great hydroelectric potential of the Columbia River system. A recent report of the United States Department of Labor points out that "the creation of new job opportunities in the region has lagged in the last five years", and warns that "unless there is an

accelerated development of the resources of the Pacific Northwest, the region's labor force and population will continue to grow at sub-normal rates". The Columbia River is the greatest of those resources. Because of the great impact this case will have, for better or for worse, on the development of that resource, the interest of the State of Washington in its outcome is immense.

III. ARGUMENT

A. This is a Case of First Impression

This case is a case of first impression for this Court; an authoritative adjudication by the Court is necessary to resolve the questions here at issue and to eliminate uncertainty as to the future administration of the Federal Power Act.

In a previous case before this Court the principal issue was whether or not "approval" of a comprehensive plan by Congress had the effect of removing the site in question from the licensing jurisdiction of the Federal Power Commission. *Chapman* v. *Federal Power Commission,* 345 U.S. 153 (1953). That issue is not involved here. Conversely, in the former case there was no question of compliance with the Corps of Engineers' comprehensive plan for the river basin involved, which is the primary question in the present case.

B. The Federal Power Commission Erred in Failing to Follow the Comprehensive Plan Intended by Congress for the Development of the Resources of the Columbia River Basin

The basic factor which spells the difference between full development of the Columbia River and serious underdevelopment is adequate upstream storage. Far more than most rivers, the Columbia needs storage

reservoirs to even out its violently fluctuating flows, which historically have an annual maximum to minimum flow ratio of about ten to one.

With adequate storage as provided by the comprehensive plan of the Army Engineers the rampaging flood waters of the spring melting season can be tamed and converted into year-around flows to keep spinning the turbines of hydroelectric generators which would otherwise be idle nine months of the year. Without adequate storage the power potential of the river will be cut in half, and the unstored water will not only be lost; it will also continue to subject thousands of families in the lower Columbia Basin to the annual threat of spring floods.

It is difficult to imagine a more apt example of the principle so clearly stated by President Theodore Roosevelt in 1908 in his message transmitting to Congress the preliminary report of his Inland Waterways Commission, when he said:

> Every stream should be used to its utmost. No stream can be so used unless such use is planned in advance. When such plans are made, we shall find that, instead of interfering, one use can often be made to assist another. Each river system, from its headwaters in the forest to its mouth on the coast, is a single unit and should be treated as such. (S. Doc. 325, 60th Cong., 1st Sess., p. iv).

Such a plan does exist for the Columbia River; it has been largely ignored by the Federal Power Commission in licensing the three projects of the Idaho Power Company.

The Congress in 1927 authorized the preparation of the original comprehensive plan of the Army Corps of Engineers for the Columbia River and its tributaries.

44 Stat. 1010. The present plan of House Document 531, 81st Congress, 2nd Session, is an authorized revision and expansion of that plan. The Federal Power Commission has here licensed for construction projects which eliminate three-quarters of the flood control and storage features of the Hells Canyon project in the comprehensive plan, while at the same time providing barely half as much power production.

The question thus presented is whether, under the "best adapted" requirement of § 10(a), the Commission may substitute, for vital components of the official and only existing comprehensive plan for the Columbia River Basin, projects which are inconsistent with and of lesser benefit than the projects provided by that plan.

Amicus curiae submits that the action of the Commission in the present case constitutes such a substitution and that the substitution is a violation of § 10 (a) of the Federal Power Act.

C. The Commission Erred in Failing to Recommend Federal Development Under § 7 (b) of the Federal Power Act

The problem of adequate flood control storage capacity in the Pacific Northwest is annually becoming more difficult because of the economic growth within the potential reservoir areas. At the same time the necessity for flood control becomes increasingly important. In 1948 a major Columbia River flood resulted in property damage in excess of $100,000,000 and the loss of 38 lives. It is estimated that such a flood today would cost in excess of $200,000,000 in property damage in view of the economic development of the affected areas.

Private licensees will not build large and costly upstream storage reservoirs, because the feasibility of such projects depends to a great extent on the benefits they produce at downstream dams, and in these the private upstream developer has no interest. Nor has it any economic interest in adequate flood control storage, which is quite properly a public problem.

A river once inadequately developed represents the permanent destruction of part of a perpetually renewable energy resource. As distinguished from other administrative decisions, the Commission's licensing decisions on river developments have irrevocable impact.

If the Commission is not required to interpret §§ 10 (a) and 7 (b) of the Act so as to obtain at the few remaining reservoir sites in the Columbia Basin the maximum feasible storage planned for those sites in the comprehensive plan, all hope of achieving adequate storage capacity will be forever lost, and the Columbia River will continue to flow unchecked to the sea in destructive and wasteful floods.

The only way to prevent such waste is for the Commission, under a correct interpretation of the Act, to require as a condition of licensing, development of these storage sites to the full dimensions of the comprehensive plan—the "best adapted" requirements of § 10 (a)—or alternatively to propose federal development under § 7 (b).

The State of Washington therefore maintains that the failure of the Commission to recommend federal development of the Hells Canyon site to the Congress constitutes, in the circumstances of the present case, a violation of § 7(b) of the Federal Power Act.

CONCLUSION

For the reasons stated above and in order to establish an authoritative interpretation of the Federal statutory law governing the Hells Canyon region, the State of Washington respectfully requests this Court to grant a writ of certiorari in accordance with the petition.

Respectfully submitted,

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Temple of Justice
Olympia, Washington
Dated February 14, 1957

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 773

NATIONAL HELLS CANYON ASSOCIATION, INC.,
LEWIS COUNTY PUBLIC UTILITY DISTRICT,
PUBLIC UTILITY DISTRICT NO. 1 OF KLICKITAT COUNTY,
BENTON COUNTY PUBLIC UTILITY DISTRICT,
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FRANKLIN COUNTY PUBLIC UTILITY DISTRICT NO. 1, and
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION,
Petitioners

v.

FEDERAL POWER COMMISSION and IDAHO POWER COMPANY,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF THE STATE OF IDAHO, AS AMICUS CURIAE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to paragraph 4, Rule 42, of the Rules of this Honorable Court, the State of Idaho appears in these proceedings to oppose issuance of a writ of cer-

tiorari, and files this brief as *amicus curiae* in support of its position.

This brief is sponsored and filed by the Attorney General of Idaho, and the Honorable Robert E. Smylie, Governor of said State.

QUESTIONS PRESENTED

The fundamental questions before this Court are whether, under the Federal Power Act, the Federal Power Commission, *or some other agency of the United States,* is to exercise the "judgment" necessary to determine (1) whether a given project is "best adapted to a comprehensive plan" of river development, and (2) whether "the development of any water resources" should be undertaken by the United States itself, in which case the Commission must submit its findings and recommendations to Congress.

Petitioners pose these questions under Sections 10(a) and 7(b) of the Act, 16 U.S.C., Sections 803(a) and 800(b). There is here no subsidiary question of "substantial evidence" to support the Commission's judgment, and it is therefore submitted that these two sections themselves answer the questions asked in unequivocal terms; that no writ of certiorari should be issued, or need be issued, to review and redetermine that which is already clear.

The Federal Power Commission is an arm or agency *of the Congress itself,* created *by Congress* to administer the Congressional Act. To the Commission,—not to the Bureau of Reclamation or the Corps of

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Abbreviations used: P., petition; P.A., appendix to petition; J.A., joint appendix; Tr., transcript; Ex., exhibit; R., record in this Court.

Engineers,—Congress has delegated the specific authority to make the decisions and arrive at the judgments necessary to administer the Nation's basic law on the development of water power resources.

The contention that the mere fact that some other agency has made a study and developed a plan (which has been officially before Congress for seven years, without acceptance, approval, adoption or authorization whatsoever), and that such a plan has deprived the Commission of its statutory jurisdiction and "judgment" with respect to license applications, is so patently untenable that no basis for further judicial review has been shown and certiorari should be denied.

THE INTEREST OF THE STATE OF IDAHO IN THESE PROCEEDINGS

Without the Snake River, southern Idaho would still be a desert. The State's present and future economy, welfare and growth depend upon the use of its waters.

Any project for the development of the Snake River, or any reach or tributary thereof, that does not fully serve and protect *upstream* as well as downstream needs and rights (both present and future) for flood control, power and irrigation, is not "best adapted to a comprehensive plan for improving and developing the waterway."

The three-dam project licensed by the Federal Power Commission qualifies as such a project; the oft-proposed but never authorized high dam at Hells Canyon does not. The Commission's judgment and decision were fully correct. No question of "substantial evidence" to support the Commission's finding is

involved. No unsettled "important question of federal law" (Rule 19 of this Court) is involved. Certiorari should be denied.

INTRODUCTORY STATEMENT

The Snake River is an interstate stream. It rises principally in eastern Idaho and in Wyoming in the vicinity of Yellowstone Park. Turning to the west, it flows some 700 miles in a broad curve across southern Idaho, fed by many Idaho tributaries in its course. It then becomes the boundary between the States of Idaho and Oregon, and for a short distance between the States of Idaho and Washington.

Most of the Snake's principal tributaries,—including Henry's Fork, the Blackfoot, the Portneuf, the Big and Little Wood, the Boise, the Payette, the Weiser, the Salmon and the Clearwater (and, in turn, their tributaries),—rise in and flow through Idaho *in their entire courses* to join the Snake.

Its two largest tributaries,—the Salmon and Clearwater,—enter the Snake *below or downstream from the Hells Canyon reach of the river.* Although, as the Federal Power Commission said (P.A., p. 28), the Clearwater and the Salmon "are the two principal flood producing streams in the Snake River Basin and the former is one of the worst flood producers in the entire Columbia River Basin, the flow of these two rivers is unregulated [i.e., they have no storage reservoirs] at the present time." Because the Salmon and Clearwater Rivers enter the Snake *below* Hells Canyon none of their waters is available for storage there; neither would any government dam at Hells Canyon help to control these streams, or serve to hold back their waters for downstream power benefits or flood control needs.

With its existing reservoirs, the Snake River *upstream* from Hells Canyon is already the best controlled tributary of the entire Columbia System. Its reservoirs, now constructed and in operation, have a total usable storage capacity of about 8,500,000 acre-feet, equal to about two-thirds of the total average *annual* flow of the river. (P.A., 29). As testified at the F.P.C. hearing by Idaho's State Reclamation Engineer and also by a former Deputy State Engineer,[1] undeveloped upstream reservoir sites can ultimately provide an additional 7,240,000 acre-feet of storage which is needed for local flood control as well as for future irrigation development, *and will also provide both downstream power and flood control benefits equally as well as a reservoir or reservoirs far downstream in the Hells Canyon reach of the river.*

With existing reservoir storage, these additional upstream reservoirs will provide more water storage capacity than there is water flowing in the river in better-than-average years. The licensed Brownlee dam of Idaho Power Company (one of the three here involved) alone will add 1,000,000 acre-feet of new storage capacity. The high Hells Canyon dam would add 3,880,000 acre-feet of capacity, which, together with existing storage (8,500,000 a.f.), would about equal the entire *total annual flow* of the river in an average year![2]

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[1] R., volume I, Tr. 2590, 4313-14; R., volume V, Exs. 54-A, 54-B, Tr. 19727-28.

[2] Approximately only 12,500,000 acre-feet (Tr. 2580-81, 21113). It should be noted that water cannot be stored throughout the entire year; the refill storage period is limited to 3-4 months, either at Brownlee or Hells Canyon; the balance of the year the reservoir is being drawn down.

The impact of the high dam upon the State's future development is readily apparent. How can future upstream reservoirs be built,—why should they be built,—if there is not enough water in the river (in average years, let alone dry years when storage is most needed) to store in them? Even today, in years of low stream flows (and when water is short for irrigation, it is also short for power generation), the big power reservoir, located far downstream from where irrigation diversions and storage are required, would be in conflict with upstream irrigation use.

Further, there are in southern Idaho more than two million acres of good, new land, needing only water to bring it under cultivation as population growth in the Nation presses upon existing food supply. This is not marginal land. It is of the same high quality as the 2 3/4 million acres now under cultivation through reclamation development. Each new acre reclaimed from the desert will require, each year, a consumptive use of from 1.75 to 2 acre-feet of water for crop growth, evaporation and other net irrigation losses. Irrigation development is steadily expanding, and the evidence before the Commission indicated that up to a million new acres may economically be brought under cultivation by the turn of the century. This will further diminish the flow of the river available for storage in the Hells Canyon area by another 1 1/2 to 2 million acre-feet each year.

THE THREE-DAM PROJECT IS BEST ADAPTED TO A COMPREHENSIVE PLAN UNDER SECTION 10(a) OF THE FEDERAL POWER ACT

Any attempt to determine, under Section 10(a) of the Federal Power Act, whether a project is "best adapted to a comprehensive plan" of river development, must necessarily and rationally consider the size

of the reservoir (or alternative reservoirs) involved. It is a matter of economic and engineering judgment, the inherent type of "judgment" delegated by Congress to the Commission under the Act.

The evidence before the Commission makes it clear in the record why the licensee determined upon 1,000,000 acre-feet of useable storage as best adapted for this reach of the river (R., Tr. 3473-82; Tr. 5544-45, 5622-39, 5643-47; Exs. 88A and 88B, J. Ap. 19805-19806). Based upon a typical 20-year period of officially recorded streamflows (1929-1948), adjusted for subsequent irrigation to date, it was estimated that with the level of irrigation development expected by 1962 (which is fairly predictable) there are only *4 years out of 20* when 3,800,000 acre-feet would be available to fill the larger reservoir; and that there would be *7 years out of 20* when there would be less than 2,000,000 acre-feet (only about half the capacity of the high dam) available in the river for re-fill storage (Ex. 88B, J.Ap., 19806; Tr. 3473, 3488). As additional irrigated acreage is brought under development, the situation, of course, will grow worse. On the other hand, the 1,000,000 acre-feet of storage, in the project licensed by the Commission, can be filled and used every year.

In fact, several engineering witnesses (including the Idaho State Reclamation Engineer and others besides those of the Applicant) demonstrated that more than 1,000,000 acre-feet of storage in this reach of the river,—even after considering additional benefits,—would result in power costs in excess of the cost from other alternative sources of supply, even including high-cost steam (R., Tr. 3001-14, 4396-97, 9442-45, 9463, 20883, 20825). This, of course, is another way

of testing the relative desirability of different size reservoirs.

These matters also reflect themselves in the power production capacity of the larger dam. Although the Commission was of the opinion (P.A., 34) that future irrigation depletions would not be significant "insofar as the power potentials" of the Hells Canyon reach of the river are concerned, the fact was made clear that, in a repetition of a low water year, such as the 1936-1937 period, generation from the high dam would have to be dropped to an average of only 66,000 kilowatts for *three entire months* of the year, and to about 490,000 kilowatts for *four additional months* (instead of the full plant capability of 800,000 kilowatts). This appears from the statement of the Power Manager of the Bonneville Power Administration, before the House Committee on Interior and Insular Affairs, Subcommittee on Irrigation and Reclamation, hearings on H.R. 5743, officially published as Serial No. 20, page 360, 82nd Congress, 2nd Session. The power loss in the high dam is due to the fact that the power plant would have to be shut down, in order to conserve water. On the other hand, the three-dam project licensed by the Federal Power Commission would not be affected at all, and could operate and maintain its full load-carrying capacity.

It is not our intention to review the evidence before the Commission. The above points are mentioned *only to illustrate* a few of the complex and conflicting objectives the Commission had to consider, and the varying assumptions that were made in the numerous studies presented in the 20,000-page hearing record with some 450 exhibits (*cf.*, P.A., 32), all of which the Commission had to rationalize and evaluate in

forming its ultimate "judgment" that the licensed project was "best adapted to a comprehensive plan" of developing the waterway. Federal Power Act, Sec. 10(a); 16 U.S.C., Sec. 803(a). They illustrate the wisdom of the rule referred to by the Court of Appeals (4th Circuit) in *U. S.* v. *Federal Power Commission*, 191 F. 2d 796, at 808 (affirmed by this Court, 345 U.S. 153, at 171):

> "The rule is no different because the questions involve matters of scientific knowledge and the evidence consists largely of the opinion of experts. The court may not, for that reason, ignore the conclusions of the experts and the Commission and put itself in the absurd position of substituting its judgment for theirs on controverted matters of hydraulic engineering. It is in just such matters that the findings of the Commission, because of its experience and the assistance of its technical staff, should be accorded the greatest weight and the courts should be most hesitant to substitute their judgment for that of the Commission * * * "

Upstream Development Is True Multi-Purpose Development

The economic life of southern Idaho depends wholly upon the Snake River and the utilization (including storage) of its waters as they flow through the State. Upstream reservoirs are essential. They store waters in the areas where the snow-melt occurs. This storage serves local flood control needs (where flood damage occurs almost every year), *and at the same time is as fully effective for control of floods on the lower Columbia as if the water were stored farther downstream* (as at Hells Canyon, after upstream flood damage has been done).

Upstream storage will also provide needed supplemental water for lands already under cultivation but with an inadequate water supply. It will supply irrigation water for new lands as future conditions require their reclamation.

And upstream reservoirs will also serve to create downstream power benefits at both Government plants and private plants located all along the Snake and on its tributaries across the State, as well as at Government plants on the lower Snake and Columbia.

There is no magic in storing all the water in the river at Hells Canyon. As pointed out above, a reservoir of excessive size would require all the remaining upstream water in order to be filled in low water years (when upstream irrigators are already short). Conflicts would inevitably arise between upstream irrigation and downstream power storage needs. The development of further upstream storage would be hindered, if not permanently blocked.

The three-dam project, as licensed by the Federal Power Commission, is a proper solution of these matters. Its million acre-feet of storage can be filled and used every year. It will not preempt water that is needed upstream for local storage there. It will be built with private funds, require no Congressional appropriations, save 400 to 500 million dollars of Federal expenditure, and thus leave the Federal Treasury in better position to provide developments that are more needed, and will be more effective, elsewhere.

It is submitted that these matters are all essential parts of determining what is "best adapted to a comprehensive plan"; that the Commission's license order is fully in accord with the clear intent and purpose

of the Act; and that no basis for granting certiorari, either under this Court's Rule 19 or otherwise, has been shown.

NO BASIS FOR CERTIORARI EXISTS TO REVIEW THE COMMISSION'S JUDGMENT UNDER SECTION 7(b)

Petitioners' contention as to the Commission's "judgment" under Section 7(b) of the Act (P.A., 37-38, 53, finding (45)), is governed by the same principles. It is the judgment of the Commission,—not of some departmental agency,—that governs whether the Commission shall submit its findings and recommendations to Congress if and because, in *its* judgment, the development of any water resources should be undertaken by the United States itself. Here, the Commission determined otherwise, for reasons clearly stated and fully supported.

If departmental studies and programs could thus withdraw from the Commission its jurisdiction and judgment conferred by statutory law, the Federal Power Act would have neither meaning nor further effect. The Act applies to *all* water power resources, *not only to those for which some other agency has not yet filed a plan.* Unless Congress itself has acted with respect to a given project or resource, the Commission's jurisdiction, as well as its "*principal responsibility*" under Section 7(b) stands unimpaired. *U. S.* v. *Federal Power Commission,* 345 U.S. 153, at 168, 173 (1953).

"The judicial function is exhausted when there is to be found a rational basis for the conclusions approved by the administrative body." *Rochester Telephone Corp.* v. *U. S.,* 307 U.S. 125, at 146. The law is clear; no writ of certiorari is required to settle it. The petition should be denied.

PETITIONERS HAVE SHOWN NO BASIS FOR FURTHER REVIEW. THE POWER SITUATION IS CRITICAL. CERTIORARI SHOULD BE DENIED

The question of power supply in southern Idaho was also properly considered by the Commission. Idaho Power Company, F.P.C. licensee and respondent in this proceeding, is the principal supplier of power in southern Idaho. It serves some 126,000 consumers in an area representing approximately 60% of the population of the entire state.

The territory is growing and power needs are expanding rapidly. For years the Company's system has shown the fastest rate of growth of all major electric systems in the Pacific Northwest—14% to 22% per year over the past ten years (J.Ap., vol. V, Exs. 19 and 23, Tr. 19460, 19466; vol. I, Tr. 1444-54). Its peak load has grown to exceed considerably its present generating capacity, and it is purchasing steam power from a neighboring utility under a temporary and declining supply contract (J.Ap., vol. VI, Ex. 24, Tr. 19466; Ex. 97, Tr. 19815). When the F.P.C. hearing closed in July, 1954, the licensee's generating capacity was (and still is) 354,700 kilowatts; its peak load had exceeded 381,000 kw (J.Ap., vol. V, Ex. 25, Tr. 19468). The situation is much worse today, two and a half years later. By 1962, the Company must have at least 610,000 additional kilowatts of generating capacity to meet its expected peak load demands (J.Ap., vol. VI, Ex. 83, Tr. 19793). Allowing for a reasonable reserve for generator outages and emergencies, *this amounts to the entire installed capacity licensed in Brownlee and Oxbow together.* The Commission recognized this need and said (P.A. 39) that the record showed "that the output of the Brownlee development would be needed by the time it could be

completed, and that an additional supply from Oxbow would be needed by 1962.'"[3] Under either basis, construction of the third (Hells Canyon) unit of the project will have to be started one and a half to two years prior to the time when its first power will be needed. Large power plants (especially in this isolated mountainous area) are not built in a day.

A stay of the Commission's license order has been denied in this Court, and the record shows that the construction of Brownlee is well under way (it will be completed, with 360,400 kilowatts, in 1958), and preconstruction work at Oxbow has also been done.

(Any temporary surplus power from the three dams will be absorbed by the Northwest Power Pool, of which the licensee Company is a part (*cf.*, P.A., 53, finding 42). The power supply in the Northwest is extremely critical, and power from every possible source is immediately and urgently needed.)

As a public utility, the licensee here has a public utility responsibility—a duty imposed by law,—of anticipating and supplying all power needs in this area,—in this case most of southern Idaho. Throughout this entire proceedings since 1950, no one else,—and certainly not the Petitioners,—has advanced any concrete, responsible proposal for supplying power to the licensee's service area. The Company pointed this out in its brief before the Court of Appeals, and it is particularly apt here. The most that Petitioners can offer is that "bills have again been introduced." Their responsibility in southern Idaho is, of course, *nil*.

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[3] This was based upon the lower estimates prepared by the Commission Staff. It is the Company, however, that has the legal responsibility of supplying southern Idaho with power.

At the request of the Federal Power Commission, the State of Idaho, through its Public Utilities Commission, submitted its views (J.Ap., vol. VI, Ex. 128, Tr. 19956-19961) on June 29, 1953. This communication is included herein as Appendix A.* It was a sound position then; and with the advantage of three and a half years of hindsight experience, it is a sound position today. In issuing a license for the project, the Federal Power Commission concurred with the State's views, as then presented, and to which the State of Idaho still adheres.

The power demands facing southern Idaho and the licensee Company's system are not only realities; *they are immediate necessities.* High Hells Canyon,—even if authorized, appropriated for, and constructed,—would require a minimum of at least five or six years after commencement of construction (assuming that adequate appropriations were annually forthcoming) before even its first generator could be in operation. Brownlee alone will provide 1,000,000 acre-feet of flood-control and power storage, and 360,400 kilowatts of power *in time to meet next year's winter peak demand.* (Except for the delays encountered through these long drawn-out proceedings, Brownlee could be in operation now; had it been, the current dropping of interruptible loads by the Bonneville Power System, with which the licenseee Company's lines are connected, could have been largely avoided.

As the Court of Appeals said (P.A. 17), "The Commission did not act hastily in this matter." Two and one-half years elapsed after the Company filed its first license application in 1950, before the Commission

* The Governor and State Reclamation Engineer of Idaho filed a similar statement on June 5, 1953 (Ex. 15, J.A., vol. V, 19455-56).

began its hearing in Washington in July 1953. The hearing continued for a full year. The Commission's license order was not forthcoming for another year, until August 1955. The Court of Appeals affirmed October 9, 1956. Petition for rehearing was considered and denied by the Court *en banc* on November 16, 1956.

During all this time (in and since 1950), bills to authorize the alternative Federal dam have been before each session of each Congress. During all this time Congress has not acted, except to reject the Federal Hells Canyon dam three times, the last by decisive Senate vote on July 19, 1956.

The case in the Court of Appeals was submitted May 15, 1956. It was decided October 9, 1956. Whether by intent (to give Congress another opportunity to act) or otherwise, the decision below followed the action and adjourment of Congress.

But, Petitioners say, new bills have again been introduced; and contend, at this late day, that this is a reason for granting their writ.

The political ramifications in the Hells Canyon controversy are clear. Already too-long extended, it has been a deterrent to other needed and non-controversial developments throughout the Northwest. In fact, *this is one of the basic reasons why the Federal Power Act was passed, namely, to keep the development of our natural resources out of politics,* and place it under the supervision and judgment of a permanent agency of the Congress, having a competent, expert and unbiased staff, and subject to all the public safeguards which the Act itself contains.

The Commission summed up its decision (P.A., 37):

> "Development by Applicant of the Hells Canyon reach of the Snake River would provide

> 1,000,000 acre-feet of flood-control storage and the required stream flow regulation in aid of navigation on the lower river at no cost to the United States, would permit a reasonably prompt development of a water-power resource now going to waste, would assist in providing sooner a source of power supply for development of phosphate resources for use in fertilizer production, and
>
> would make possible the serving of electric consumers in the service area of Applicant with the lowest cost power supply that it could develop."

The usual 3-judge panel of the Court below affirmed, and the Court *en banc* considered and denied petition for rehearing.

CONCLUSION

The State of Idaho submits that no sound basis for certiorari has been shown; that the Commission's decision was in full accordance with the intent and purposes of the Federal Power Act; and that the Court below correctly affirmed. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body". *Rochester Telephone Corp.* v. *United States, supra.*

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GRAYDON W. SMITH
Attorney General of Idaho

ROBERT E. SMYLIE
Governor of Idaho

State House
Boise, Idaho

March 11, 1957

APPENDIX A

George R. Jones, President
H. C. Allen
H. N. Beamer
Commissioners

(19956)
(Exh. 128)

Stephen L. Guice,
Secretary

R. E. Larsen,
Utilities Auditor

R. W. Shirley,
Chief of Transportation

Idaho Public Utilities Commission
Boise

Address All Communications to the Commission

In Reply Please Refer To File No. .....

June 29, 1953

Federal Power Commission
Washington 25, D. C.

Gentlemen:

RE: PROJECTS 1971, 2132 and 2133

Reference is made to the Commission's letter of May 25, 1953, together with Notice dated May 25, 1953, of applications for licenses for Projects 2132 and 2133; also copy of Order of May 27, 1953 fixing hearing on applications for licenses for Projects 1971, 2132 and 2133, and consolidating all three proceedings for hearing set for July 7, 1953. In response to the above Notice, we desire to advise the Federal Power Commission as follows:

I.

The Idaho Public Utilities Commission is the official agency and regulatory authority of the State of Idaho, charged with the legal duty to administer the Idaho Public Utilities Law (Idaho Code, Title 61) and, among other

things, to insure that the public is provided with adequate electric service, without preference or discrimination, and at just and reasonable rates.

II.

The Idaho Power Company, applicant for licenses for Projects 1971 (Oxbow), 2132 (Hells Canyon) and 2133 (Brownlee), is an electric public utility, subject to the Public Utilities Law of the State of Idaho, and the regulatory authority and control of this Commission. Said Company is by statute of the State of Idaho (Idaho Code, Sec. 61-302) required to furnish, provide and maintain such service and facilities as shall be in all respects adequate and efficient. Said Company provides electric service to approximately 118,000 customers in southern Idaho, eastern Oregon and northern Nevada, and through the provision of electric power generating stations has provided service and facilities which have been adequate and efficient in supplying all electric power demands of its customers and the service requirements of the area which it supplies. In spite of the fact that such requirements have grown, and are continuing to grow, with great rapidity, this Commission points out to the Federal Power Commission that the southern Idaho area, and those portions of eastern Oregon which receive their electric service from the power generated and provided by this applicant, are the only areas in the Pacific Northwest in which there is not and never has been a shortage or deficiency of electric power supply.

III.

Applicant's maximum hour system load increased from 111,200 kilowatts (KW) in 1945, to 242,100 KW in 1950, an increase of 118%. By 1955, applicant's peak load is estimated to increase to approximately 440,000 KW; and by 1960, to 740,000 KW.

IV.

As stated in the applications for licenses for Projects 2132 and 2133, the installed capability capacity of applicant's power plants on its system (excluding the minor standby installation in the Salmon area) is 354,700 KW. It is obvious and imperative that a major installation of additional generating capacity by said applicant should be commenced immediately; otherwise, by 1955 (the earliest date by which the Oxbow or any other development could be placed in service) applicant's system load will exceed its system generating capability by more than 88,000 KW; and by 1960, by approximately 390,000 KW. It is assumed that loads in the Northwest area (where deficiencies already exist) will have a corresponding growth.

V.

This Commission endeavors to keep in touch with the prospective load requirements and the power supply programs of the applicant, as well as other utilities under its jurisdiction, in order to insure, if possible, that the people of the State of Idaho, and the future growth of the area, will not suffer from a shortage of needed power supply such as exists elsewhere in the Northwest. The Commission is familiar with various investigations which have been made by the applicant as to other power sources, including steam generation, and also including preliminary investigations as to other hydro site potentials on Snake River. Aside from the fact that all of said developments would be unduly expensive to construct, none of said sites is large enough to warrant development at this time in view of the rapidly growing power demands of the southern Idaho and eastern Oregon area, and the increasing seriousness of the deficiency in power supply which already exists in the Pacific Northwest.

VI.

With respect to Projects 1971, 2132 and 2133, the applicant's estimates of the cost thereof indicate that the Oxbow

development can be installed at a cost of approximately $156 per KW of capacity; that all three developments (Oxbow, Hells Canyon and Brownlee, including 1,000,000 acre-feet of usable annual storage) can be installed at an over-all average cost of approximately $170 per KW of capacity. This Commission has reviewed and checked said cost estimates, and believes them to be reasonably accurate and sufficient, based on existing construction costs and conditions. This Commission points out that these costs of $156-$170 per KW of installed capacity are phenomenally low costs for hydroelectric generating installations.

VII.

This Commission is generally familiar with various proposals for the construction of multiple-purpose hydroelectric power installations by the Federal Government or agencies thereof; also with the proposal for the construction of a high dam for power purposes at Hells Canyon, which latter would flood out and destroy all three of the sites for Projects 1971, 2132 and 2133. From available reports and investigations, it appears that said projects will provide flood control, navigation and recreational benefits comparable with those claimed for said Hells Canyon high dam proposal; and from published figures concerning said Hells Canyon proposal, it appears that, regardless of controversial statements as to the power capacity and value thereof, the cost thereof is excessive and uneconomic,—approximately $450 per kilowatt of installed capacity, and that the cost per kilowatt of additional power, if any, which would be available from the proposed Hells Canyon high dam power plant, over and above the power available from Projects 1971, 2132 and 2133, would be several times said amount.

Furthermore, this Commission points out to the Federal Power Commission that neither the Northwest area in general, or the southern Idaho area in particular (for whose adequate power supply the Idaho Commission is re-

sponsible as a regulatory body as provided by law), can await the seven to ten years that will obviously be required for the construction of Hells Canyon high dam or any other new development of comparable cost and size, even assuming that adequate appropriations for continuously prosecuting the work could be obtained. On the other hand, Project 1971 (Oxbow) can be completed and in service within 24 months, and Projects 2132 and 2133 in 30 to 36 months, thus providing 783,000 kilowatts of rated capacity and 900,800 kilowatts of peaking capability (plus additional generation from downstream plants as a result of water releases from the Brownlee storage reservoir) for which there is urgent and immediate need.

VIII.

Idaho Public Utilities Commission is by statute a bipartisan, non-political body, and is not interested in or concerned with the ideologies and politics of the Hells Canyon-Oxbow controversy. This Commission, however, is vitally concerned with and to the extent provided by law responsible for the essential and necessary supply of power, by the electric utilities under its jurisdiction and regulation, to the people of the State of Idaho and the installation by said utilities of adequate generating facilities, as required of them by the laws of Idaho, to anticipate and meet the rapidly increasing demands for electric power in their service area, so as to avoid the critical shortages and deficiencies which have been permitted to develop elsewhere in the Northwest. The development of existing phosphate furnace mining and other industrial loads in southern Idaho, including important loads involving the national defense and security, as well as the increase in general load, make the problem of a continued adequate power supply, and the immediate installation of additional generating facilities, one of vital and immediate concern to this area and to the national welfare, and a problem which has now reached emergency proportions.

We submit that it is the responsibility of regulatory commissions to see that no power shortages develop, and to anticipate power demands, and provide for facilities being ready to meet them, in advance of their occurrence. We request that every effort be made to reach a prompt decision as to the method of development of the stretch of the Snake River involved in these proceedings, and that appropriate licenses be issued for the full and speedy development of the power resources of this area, as a requirement of immediate public necessity.

IDAHO PUBLIC UTILITIES COMMISSION
/s/ By GEORGE R. JONES
George R. Jones, *President*

ATTEST:

/s/ STEPHEN L. GUICE
Stephen L. Guice, *Secretary*

cc: Governor Len Jordan